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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 708

LUELLA DUBE ET AL.,
Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN C. MELANIPHY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Respondent.

SYDNEY R. DREBIN,
CLAUDE E. WHITAKER,
HARRY H. POLLACK,
Assistant Corporation Counsel,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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The respondent, City of Chicago, a municipal corporation, opposes the petition for writ of certiorari on the following grounds:

I.

The petition for certiorari does not comply with rule 23 of the Rules of the Supreme Court of the United States and fails to present the matters essential for consideration by this court.

Rule 23 of the rules of this court provides:

> "The petition for writ of certiorari shall contain in the order here indicated—
>
> "(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, showing:

"(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari."

Under the heading, "Jurisdiction" (Petition For Writ of Certiorari, p. 1) the petitioners state that, "The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (2)."

Section 1257 provides, "That final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Since review is sought in this case by certiorari and not by appeal, the statutory provision cited by the petitioners is inapplicable and petitioners have failed to establish jurisdiction for their petition.

Rule 23 (d) of the rules of this court provides that the petition for certiorari must show:

"The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at the point, and their pertinent text shall be set forth in an appendix."

The petitioners under "Questions Presented" (Petition For Writ of Certiorari, p. 2) allude to "Chapter 99-60 of the Municipal Code of the City of Chicago" and "Section 12 of the Zoning Ordinance of the City of Chicago" as being involved herein but fail anywhere in their petition to set them out verbatim or cite the volume and page where they may be found in the official edition.

Petitioners' failure to comply with Rule 23 (d) has resulted in petitioners failing to present to this court the very matters essential for this court to have in order to rule on the petition for writ of certiorari and is sufficient reason for the denial of said petition.

Rule 23 (f) of the rules of this court provides that the petition for certiorari must show:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears * * * as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In their "Statement of the Case" (Petition For Writ of Certiorari, pp. 3-5) petitioners, aside from stating, that their complaint alleges that Chapter 99-60 and Section 12, as applied to them, violate the "14th Amendment to the Constitution of the United States," fail to show how this question was passed upon by the state courts and fail to cite "pertinent quotations of specific portions of the record as will show that the federal question was timely and properly raised."

In the absence of the foregoing required showing, the petitioners have failed to make the showing necessary to give this court jurisdiction to review the judgment below and the petition for writ of certiorari should be denied.

II.

The holding in this case does not present a federal or constitutional question.

Section 12 (2) of the Chicago Zoning Ordinance establishes certain manufacturing districts and enumerates the uses permitted therein. One of the permitted uses in such a district is the manufacture of metal and metal products, except by certain methods involving snap riveting and processes used in bending and shaping which produce noises disturbing the peace and comfort of occupants of adjacent premises.

In the case at bar, the Supreme Court of Illinois was called upon to construe the provisions of Section 12 (2) as applied to the petitioners' property. In its opinion (Petition For Writ of Certiorari, p. 10a) the court said:

> "* * * Though noise is not a nuisance *per se*, it may be of such a character as to constitute a nuisance in fact even though it arises from the operation of a factory, industrial plant or other lawful business or occupation. (*Phelps* v. *Winch*, 309 Ill. 158; 39 Am. Jur. 330.) The test in such cases is 'whether rights of property, of health or of conduct are so injuriously affected by the noise in question that the sufferer is subjected to a loss which goes beyond the reasonable limit imposed upon him by the condition of living, or of holding property, in a particular locality in fact devoted to uses which involve the emission of noise although ordinary care is taken to confine it within reasonable bounds; or in the vicinity of property of another owner who though creating a noise is acting with reasonable regard for the rights of those affected by it.' (*City of Chicago* v. *Reuter Bros. Iron Works, Inc.*, 398 Ill. 202, 208, quoting from the opinion in *Tortorella* v. *H. Traiser and Co.*, 284 Mass. 497.) A zoning ordinance which delimits designated areas for the location of manufacturing industries or general business does not license the emission of every noise profitably

attending the conduct of such businesses. (*Tortorella* v. *H. Traiser and Co.*, 284 Mass. 497.) In other words, no one, even in pursuing an otherwise lawful business, ever acquires a vested right to create or maintain a noisy nuisance in connection therewith."

The court continued (p. 11a):

"We believe that the proof in the record before us is sufficient to show that plaintiffs have been guilty of maintaining a common-law nuisance in the manner in which they have operated their business. Six residents testified that the noise from the plant was such that it caused them serious discomfort. There was some testimony that the noise was attended by vibrations. One witness testified that when a certain heavy machine was used his house vibrated. Another testified that the dishes in his home rattled. Sometimes the operations carried on outside the plant are at night, though this does not happen all the time. All of these witnesses testified that the other noises in the neighborhood do not bother them; that the noises from Dube have been burdensome only since 1944 when operations were begun outside and that formerly the noises from Dube were not disturbing."

It is submitted that the case at bar involves only the construction of city ordinances as they affect the petitioners' property and that no federal or constitutional question is presented by the decision.

Relative to section 99-60 of the Municipal Code of Chicago, the court said (Petition For Writ of Certiorari, p. 12A):

"Much of what has already been said as to section 12 of the zoning ordinance applies as well to section 99-60 of the Municipal Code. The plaintiffs say that as applied to their property its effect is to exclude and prohibit an existing and established use and business. As we view it, this ordinance merely says that no factory shall be operated or maintained within 200 feet of a residence in such a way that loud and unusual

> noises are emitted, thus creating a nuisance. The law does not prohibit the use of pneumatic hammers or any other apparatus in connection with the operation of a factory within 200 feet of a dwelling but it does say that if such devices are used they shall not be used in such a manner as to cause loud or unusual noises."

Like section 12 (2) of the zoning ordinance, the provisions of section 99-60 of the Municipal Code are regulatory in nature. They have as their object the protection of the public health, safety, comfort, morals and general welfare. As applied to the petitioners' property, section 99-60 represents a valid exercise of the police power.

In construing this ordinance, the court made a determination on the basis of the evidence presented by the record and no federal or constitutional questions are presented by the decision.

It is of interest that the petitioners make no reference to section 19 of the Chicago Zoning Ordinance. The first paragraph of this section provides:

> "Any lawful use of property on the effective date of this ordinance, which by virtue of its provisions is a nonconforming use, is permitted after this ordinance becomes effective, subject to the following limitations."

The Supreme Court of Illinois made a factual determination from the record and rejected the contention that the petitioners were maintaining a nonconforming use within the scope of section 19.

The record herein and the findings of the Supreme Court of Illinois show that this matter has been litigated twice by the parties and that both times it was held that petitioners were trying to expand their nonconforming use into a different and more intense one. The respondent is not seeking to prevent the petitioners from using their premises in a lawful manner but only from using their

premises in an unlawful manner to the detriment, discomfort, and interference with the rights of the surrounding residential and other property owners.

The court below decided the matter herein from a factual standpoint and determined from the facts that the petitioners were violating the ordinances in question. It is significant that the petitioners make no attack on the ordinances as being void but only contend that the enforcement of same against them is unconstitutional. This is not a constitutional question. Only a question of construction.

The petitioners also fail to show that other businesses in the same manufacturing district as themselves are not subject to the same limitations as to noises as they are. All manufacturers in said district are under the same restraint as to noise as the petitioners. Petitioners also fail to show that the noises and uses practiced by them are permitted in higher use districts in Chicago and that if they located in said use districts they could freely conduct their business there.

The petitioners are complaining, not of want of due process, but of an alleged erroneous decision of the Supreme Court of Illinois in the course of the usual judicial process. The Federal Constitution offers no guarantee of correct decisions.

Ballard v. *Hunter*, 204 U. S. 241, 258.
Chicago L. Ins. Co. v. *Cherry*, 244 U. S. 25, 30.

III.

There are no important questions of law or policy involved.

It is respectfully submitted that this case presents no important questions of federal law and that it is not in conflict with the decisions of this court or with those of any other federal court of appellate jurisdiction.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

JOHN C. MELANIPHY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Respondent.

SYDNEY R. DREBIN,
CLAUDE E. WHITAKER,
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